



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Black Hills Refuse Service
File: B-228470
Date: February 16, 1988

DIGEST

1. Large business is an interested party to protest that the award price under a small business set-aside is unreasonable, since, if successful, the requirement could be resolicited on a non-set-aside basis, and large businesses would be eligible for award.
2. Where the contracting officer makes a finding of price reasonableness based solely on a government estimate, and the estimate is shown to have been calculated improperly, the price reasonableness determination is invalid and should be redetermined based on a properly calculated estimate.

DECISION

Black Hills Refuse Service protests the award of a contract to Fish Sanitation under invitation for bids (IFB) No. R2-03-88-01, issued by the Forest Service, United States Department of Agriculture, as a total small business set-aside for garbage hauling. Black Hills contends that the Forest Service improperly determined that Fish's price was reasonable. We sustain the protest.

BACKGROUND

Three bids were received by the September 15, 1987, bid opening date, as follows:

Sander Sanitation	\$71,500.00
Fish	\$39,504.00
Black Hills Refuse Service	\$27,766.20

The government estimate was \$25,013.50. Sander Sanitation's bid was rejected as nonresponsive because it failed to offer on all requirements, and Black Hills was ineligible for award because it is a large business. As Fish thus was the low (and only) responsive bidder, the contracting officer proceeded to consider the firm's responsibility and the reasonableness of its price. In this latter regard, the

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agency asked Fish why there was such a large discrepancy (36 percent) between its bid and the government estimate. Fish explained that its price might seem high because it took into account a predicted increase in the dumping, or "tipping," fees required to dump at the city landfill. The contracting officer contacted the Superintendent of Sanitation for Rapid City, South Dakota, who reportedly confirmed that the tipping fees could triple by May 1, 1988. Based upon this information, the contracting officer revised the government estimate to \$34,813.50. Since Fish's price was only approximately 13 percent above this revised estimate, he determined that Fish's bid was reasonable and awarded the firm the contract. Work on the contract has not been suspended while the protest is pending, on the ground that the potential health hazard of unremoved garbage provides an urgent and compelling reason to proceed with performance. See Bid Protest Regulations, 4 C.F.R. § 21.4(b) (1987).

Black Hills claims that the revised government estimate was calculated incorrectly due to erroneous figures and misunderstandings about the sanitation business, and that the contracting officer thus did not make a valid finding of price reasonableness, as he is required to do under Federal Acquisition Regulations (FAR) § 14.407-2 (FAC 84-8), before making award. Black Hills further argues that Fish's price is unreasonable under a correct government estimate, and concludes that Fish's contract should be terminated; that the set-aside should be withdrawn; and that the solicitation should be reissued on an unrestricted basis.

The Forest Service responds, first, that, as a large business, Black Hills is not an interested party to protest a small business set-aside procurement and, secondly, that the contracting officer used reasonable judgment in revising the government estimate and in finding Fish's bid reasonable.

INTERESTED PARTY

Under our Bid Protest Regulations, only an "interested party" may protest a federal procurement. 4 C.F.R. § 21.1(a). An interested party is an actual or prospective bidder whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. 4 C.F.R. § 21.0(a). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's

status in relation to the procurement. Therm-Air Mfg. Co., Inc., 59 Comp. Gen. 255 (1980), 80-1 CPD ¶ 119; Canaveral Towing & Salvage, Inc., B-211627.2, et al., Dec. 19, 1983, 83-2 CPD ¶ 702.

Here, a decision in Black Hills' favor could necessitate a resolicitation since there was no responsive bidder other than Fish. While the contracting officer would not be required to withdraw the set-aside determination under these circumstances, this could be the result in view of the limited small business competition generated and the absence of a reasonable small business bid; were the set-aside withdrawn, Black Hills would be eligible to compete. We note in this regard that, in order to conduct a procurement as a small business set-aside, the contracting officer must have a reasonable expectation that (1) offers will be obtained from at least two responsible small businesses; and (2) that the award can be made at a reasonable price. FAR § 19.502-2 (FAC 84-31). We conclude that the possibility of a withdrawal of the set-aside in the event of a resolicitation constitutes a sufficient stake in the outcome of the protest to render Black Hills an interested party. This conclusion is consistent with prior decisions in which we have permitted large businesses to protest the issue of price reasonableness in a small business set-aside context under facts similar to those here. See, e.g., U.S. Elevator Corp., B-224237, Feb. 4, 1987, 87-1 CPD ¶ 110.

PRICE REASONABLENESS

The contracting officer explains that he calculated the revised estimate by first increasing the current tipping fees by \$1.40 (from \$0.70 to \$2.10) per cubic yard based on the information from the Superintendent of Sanitation; multiplying the estimated 7,000 uncompacted cubic yards of garbage by the \$1.40 increase to determine the total cost increase of \$9,800; and then adding this amount to the original \$25,013.50 estimate to reach the new estimate of \$34,813.50. Although Fish's bid price was 13 percent higher than this revised estimate, the Forest Service found that this was not an unreasonable premium to pay a small business, and that Fish's price therefore was reasonable.

Black Hills contends that the revised government estimate was calculated based on an excessive increase in tipping fees, and thus was not a valid standard for determining price reasonableness. Specifically, Black Hills asserts that the use of 7,000 cubic yards, the uncompacted volume, to calculate the impact of the increase in tipping fees is not rational because, as a matter of industry practice, sanitation contractors do not dump loose yards of garbage, but, rather, compact the garbage in the trucks to produce a

significantly smaller number of cubic yards. This practice, Black Hills explains, produces significant cost savings, and thus should have resulted in a lower revised estimate, as the compaction ratio apparently can range from 4:1 (as conceded by the awardee), to Black Hills' higher alleged ratio of between 5:1 and 7:1.

A determination of price reasonableness is a matter of judgment within the administrative discretion of the contracting officer, and we will not question such a determination unless it is unreasonable or there is a showing of fraud or bad faith by the agency. U.S. Elevator Corp., B-224237, supra. We conclude that the agency's determination here was unreasonable.

We find that the record supports Black Hills' argument that by calculating the revised estimate based on loose, rather than compacted cubic yards of waste, the agency overstated the increase in the estimate by a factor of from four to seven times. Thus, instead of an increase of \$9,800, the estimate might reasonably have increased only \$1,400 to \$2,450, resulting in a significantly greater difference between Fish's bid and the revised estimate. There is nothing in the record indicating that the agency would have found Fish's bid reasonable in comparison to such a lower revised estimate.

The Forest Service reports it was advised by the Superintendent of Sanitation that the tipping fees were based solely on the volume capacity of the truck, and that the fees for a truckload of waste therefore would be the same whether or not compacted. The Forest Service concludes that its calculations thus reasonably were based on the full 7,000 cubic yards of loose, noncompacted waste.

We think the Forest Service's position is untenable, based on the record here. The fact that the tipping fees are assessed per truckload is not controlling; rather, the dispositive consideration is the fact that the agency has ignored information bearing on the number of truckloads that can be expected under the contract. Again, as Black Hills asserts, and even Fish agrees, compaction of waste is the industry norm since it allows the packing of more waste into a truckload, thereby reducing the number of trips needed for the collection process and, concomitantly, the cost of performing. The agency's calculations (i.e., ignoring compaction) thus result in a higher number of truckloads than will actually be experienced, and a correspondingly excessive estimate of the tipping fees. Since taking compaction into account thus would result in a much

smaller increase in the government estimate than the agency calculated, the price reasonableness determination is in doubt.

Therefore, by separate letter to the Secretary of Agriculture, we are recommending that the contracting officer recalculate the government estimate, taking into consideration prevailing norms of the sanitation industry, as discussed in our decision, as well as all other relevant information, including the tipping fees actually in effect at the time of the recalculation. If, based on this information (including the recalculated estimate), Fish's bid price is found to be unreasonable, the requirement should be resolicited. Further, prior to any resolicitation, the Forest Service should reexamine the validity of the set-aside determination.

The protest is sustained.

for Milton J. Jorolan
Comptroller General
of the United States